FRONT Report LINE

January 2000 | OFFICE OF MISSOURI ATTORNEY GENERAL | Vol. 7, No. 1

HOUSE BILL 1215

AG proposes Internet crime bill

ATTORNEY GENERAL Jay Nixon, House Speaker Steve Gaw and state Rep. Phil Smith are pushing for an Internet crime bill that will help law enforcement fight crimes brought on by the rapid advance in computer technology, including child porn trafficking and cyberstalking.

The AG's Office helped author HB 1215, which is co-sponsored by Gaw and Smith.

The Internet 2000 Crime Bill will:

■ Make Internet stalking and harassment illegal. This includes posting harassing messages in a chatroom or on a Web site, sending repeated, unwanted messages and concealing one's identity when sending messages.

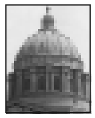
■ Enhance the penalty for invasion of privacy when nude images are made accessible by computer.

■ Protect personal electronic information by making it illegal to use a computer to examine financial, medical and other confidential information without authorization.

■ Expand the crime of creating a catastrophe to include the sending of a computer virus or altering a computer program that controls a public service.

■ Expand child porn laws to include the creation, transmission and possession of Internet child

SEE HB 1215, Page 2



Other law enforcement-related bills: Pages 2-3

The AG's Office is considering other legislative changes. If any agencies are considering law changes in response to their computer-related criminal cases, please call assistant attorney general James Klahr at **573-751-3321**.

Top court upholds warrantless car searches

THE U.S. SUPREME Court last June reinforced the legality of police officers conducting warrantless searches of automobiles when there is probable cause to believe evidence is in them.

The Supreme Court summarily reversed a Maryland appellate court decision that had invalidated a search of an automobile because no "exigent circumstances," or emergency situation, existed.

Although police had probable cause to search a suspect's car for drugs, they waited 13 hours. The Maryland court ruled this established no "exigency" to make a warrantless search and thus, the officers should have obtained a warrant.

The Supreme Court reversed, emphasizing that under the Automobile Exception to the search warrant requirement, a police officer only needs probable cause to search — exigency does not need to be proved.

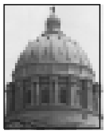
Supreme Court ruling affirms there is no general right to search crime scene without warrant: Page 3

Army offers free counterdrug training

LAW ENFORCEMENT officers can get free training from the U.S. Army's Advanced Law Enforcement Training Division, which has moved its operations to Fort Leonard Wood.

Training courses include undercover investigations, field tactical operations and marksmanship. Lodging and meals also are free.

Call Peter Deming, senior instructor, at 573-596-0730. Requests for instruction must come from agencies, not individual officers.



LEGISLATIVE UPDATE

Several measures that would affect the law enforcement community have been filed for the upcoming legislative sessions including a few dozen that make changes to criminal laws. Among the bills:

HOUSE BILLS

HB 1070 establishes a Policemen and Sheriff's Deputies Trust Fund within the state treasury. Starting July 1, 2001, monies from this fund will be earmarked to increase minimum salaries of full-time police officers and deputies to at least $20,000 in jurisdictions where the minimum now is less than $20,000. This provision will end on July 1, 2005.

HB 1086 and SB 576 create the crime of financial exploitation of an elderly person.

HB 1126 provides that in prosecutions under Chapter 195, RSMo, evidence that the defendant consumed a controlled substance may be used to prove possession.

HB 1146 creates the crime of leaving a child unattended in a vehicle. The crime is committed if the child is fatally injured or if the child fatally injures another person by causing a vehicle collision.

HB 1152 prohibits suspended imposition of sentence, probation or a fine in lieu of prison for a person who commits first-degree assault and for a person who commits second- or third-degree assault against a mass transit worker or passenger.

HB 1168 creates the crime of selling or attempting to buy or sell any child younger than 18. The crime is a class B felony.

HB 1169 amends the crime of second-degree statutory rape so that a person age 19 or older who has sexual intercourse with another person younger than 17 commits the offense.

HB 1184 prohibits a driver from using a cell phone except to call emergency personnel. The crime is a class B misdemeanor or a class A misdemeanor if an accident occurs.

HB 1188 increases the penalty for failing to obey a law enforcement officer's signal to stop to a class D felony.

HB 1212 makes it a class C felony to sell fetal body parts.

HB 1220 expands the crime of unlawful use of weapons to include carrying a weapon onto school grounds or onto a school bus, unless the person brings the weapon to participate in a school-sanctioned, firearm-related event. Violation is a class C felony.

HB 1222 changes the sexual registration law to comply with federal law.

HB 1226 repeals the death penalty.

HB 1262 increases the jail holding time for defendants accused of committing certain felonies.

HB 1215 PROVISIONS

CONTINUED from Page 1

pornography. It also would require computer providers, installers and repair persons to report child pornography to law enforcement. Film processors now have this duty.

■ Protect children from pornography by requiring public schools and libraries to install filtering software by July 2002.

■ Expand jurisdiction for computer crimes to any county in which a computer is accessed or located and through which a network passes.

■ Amend current computer crimes statutes, particularly the definitions section.

Front Line Report is published on a periodic basis by the Missouri Attorney General's Office, and is distributed to law enforcement officials throughout the state.
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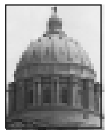
HJR 44 divides forfeiture proceeds, if approved by voters, with 50 percent going to schools and 50 percent to the State Forfeiture Fund to be established by law.

SENATE BILLS

SB 532 bans the sale or possession of assault weapons unless the person possessed the weapon before the bill takes effect and that person applies for a certificate of possession with the Department of Public Safety by Aug. 28, 2001.
The bill also exempts weapons possessed by: law enforcement agencies; Department of Corrections; military; and executors or administrators of estates that include a lawful assault weapon. It also restricts how these weapons are transported.

SB 546 creates the crime of driving with an aggravated BAC if a person is driving with a BAC of 0.15 percent or greater. This crime is a class B misdemeanor and the offender must complete a substance abuse traffic program for repeat offenders.



LEGISLATIVE UPDATE

SB 554 increases the penalty for possession of child pornography to a class D felony if the offender has more than 25 images or if one film involving minors is involved.

SB 578 lowers the BAC to 0.08 percent in order to prove that a person is guilty of driving with excessive BAC.

SB 580 provides that any theft or attempted theft of liquid nitrogen is a class D felony. This tracks current law on theft or attempted theft of anhydrous ammonia.

SB 590 creates the crime of trespass on a school bus. This crime is a class A misdemeanor.

SB 611 revises the Criminal Activity Forfeiture Act in three ways:

- Defines "seizure" of property for forfeiture.
- Allows transfer of property to federal authorities if it appears that the criminal activity involves more than one state or shall result in a federal prosecution.
- Allows a limited transfer of property to federal authorities to complete a criminal investigation.

SB 657 allows a person to expunge a conviction for a wildlife offense if three years have passed and no other violations have occurred.

SB 671 amends the dollar limit for felony stealing:

- Class A misdemeanor if value of property is less than $150;
- Class D felony if value is at least $150 but less than $425.
- Class C felony if the value is $425 or greater.

SB 683 imposes an additional fine of $250 if a person speeds in a construction or work zone where a worker is present.

SB 707 creates the crime of evading a law enforcement officer and makes it a crime of second-degree assault to attempt to forcefully take a deadly weapon from a law enforcement officer.

Court: Warrant needed to search crime scene

THE U.S. SUPREME Court on Oct. 18, 1999, issued an opinion affirming earlier caselaw that held there is no general right to search a crime scene without a warrant.

In *Flippo v. West Virginia*, the court held that police had no authority to search a briefcase found at a murder scene without a warrant.

Flippo called the police and said he and his wife had been attacked; she was killed. Pictures found in the briefcase suggested a motive for Flippo to have killed his wife.

The Supreme Court indicated that while officers have the right to be at a crime scene, there is no general right to do a "crime scene" search without a warrant. Any warrantless search must usually be justified as an exigent, or emergency, search.

For example, a "protective sweep" of a home to look for other victims or a suspect who might be armed is justified. Evidence that is in "plain view" may be seized. But officers cannot conduct a general and nonspecific search of a crime scene to gather evidence.

In 1978, the Supreme Court ruled in *Mincey v. Arizona* that police officers violated the Constitution when they conducted a four-day search of a suspect's apartment where he had killed a police officer. The court held that suspects do not lose any reasonable expectation of privacy because they are suspects and that a warrant was needed.

YEAR 1 Strike Force wins 37 convictions

THE AG'S METH PROSECUTION Strike Force convicted 37 meth producers and users in its first full year of operation in 1999.

Strike Force Director Tim Anderson said his staff also got 55 new requests for assistance from prosecutors and worked on 110 cases in 35 counties.

He credits local, county and state law enforcement and county prosecutors for their hard work and cooperation in shutting down meth producers. "They are determined to win this fight."

This determination is evidenced by an estimated 960 meth labs busted last year.

When making busts, Anderson encourages law enforcement to search for items that might link an individual to a residence. Seize items such as clothing the person is wearing or has in a closet. Also fingerprint meth lab items.

He said this will increase chances for a successful prosecution.

> **"The Strike Force is a real asset to us in helping dismantle or dispose of the toxic evidence left behind in meth lab busts. They also help with the important task of following through and seeing that manufacturers are prosecuted."**
> — Pulaski County Sheriff **J.J. Roberts**

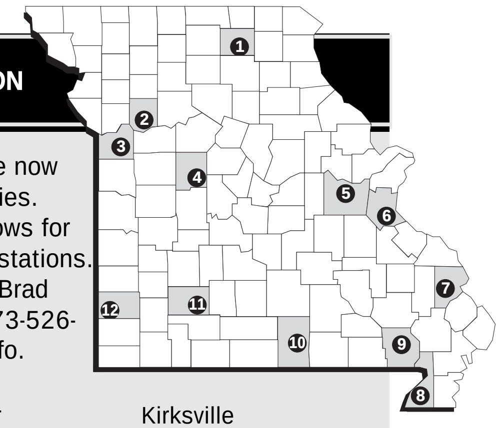
Call the Strike Force for meth training or info: 573-751-1508

CLEANUP COSTS CUT

To handle meth wastes, 12 collection stations were put into operation last year. The Strike Force is an active member of the Missouri Interagency Clandestine Lab Task Force, whose goal is to place stations within 50 miles of any law enforcement agency.

Many meth by-products are neutralized on site by local personnel and Department of Natural Resources staffers, who also process and remove remaining toxic wastes. By eliminating a Drug Enforcement Agency cleanup, the state has slashed the cost of cleaning up a lab from an average $2,400 to $125, Anderson said.

METH COLLECTION SITES



Stations are now in 12 counties. Funding allows for eight more stations. Call DNR's Brad Harris at 573-526-4794 for info.

1	Adair	Kirksville
2	Ray	Richmond
3	Jackson	Grain Valley
4	Pettis	Sedalia
5	Franklin	Union
6	Jefferson	Hillsboro
7	Cape Girardeau	Jackson
8	Dunklin	Kennett
9	Butler	Poplar Bluff
10	Howell	West Plains
11	Greene	Springfield
12	Jasper	Joplin

Jailhouse video public record

THE MISSOURI SUPREME Court ruled that a surveillance tape that captured the arrest and booking of a state legislator for DWI is a public record that must be disclosed.

The Cole County Sheriff's Department had denied a TV station's request for a videotape copy.

The sheriff then asked the court to declare the refusal to be lawful and proper. He argued that videos are not required to be made or kept; therefore, the video was not a public record.

Click for the entire text of the Sunshine Law booklet on the AGO's Web site: **www.ago.state.mo.us**

The court ruled that such videos are public records and are open.

The opinion does not require police agencies to permanently keep tapes. Many reuse their audiotapes and videotapes every 30 days. They still can.

If a video is requested, however, the department cannot erase or reuse the video and say, "Sorry, it's gone."

The Sunshine Law authorizes governmental agencies to initiate lawsuits to determine whether they should disclose materials. The sheriff took the initiative to ask for a judicial determination after denying the request.

The Supreme Court's decision suggests that when a governmental body brings such a suit it must pay all expenses — win or lose. The sheriff must pay the attorney fees and costs of the TV station. This interpretation could discourage agencies from seeking a judicial determination and have a "chilling effect" on disclosure.

This ruling makes it even more important that agencies consult with legal counsel before deciding to deny any Sunshine Law request.

UPDATE: CASE LAW

EASTERN DISTRICT

State v. Michael R. Withrow
No. 73579
Mo. App., E.D., July 13, 1999

The court reversed the defendant's conviction of attempt to manufacture meth, saying the state failed to prove the defendant was in constructive possession of the premises.

The defendant was in a bedroom in which meth-making items were found in the closet, but the state failed to prove any more evidence connecting the defendant to the equipment. The state also failed to prove the defendant lived there. A dissent has resulted in the case being transferred to the Missouri Supreme Court.

State v. Benjamin Bird
No. 74827
Mo. App., E.D., Sept. 7, 1999

The court reversed the defendant's conviction of receiving stolen property for insufficient evidence. Particularly, there was no evidence to support finding when the defendant acquired the rifle, which provided no unexplained possession by the defendant of recently stolen property.

State v. Robin P. Mayer
No. 74987
Mo. App., E.D., Oct. 5, 1999

The court upheld the defendant's conviction of felony murder where the underlying felony offense was DWI, which was elevated to a class D felony because of multiple prior convictions for the same offense.

The court rejected the defendant's argument that the jury was required to uncover the prior DWI convictions. The courts have regularly held that the court, not the jury, should determine prior convictions.

Challenge to state's use of breathalyzer dropped

A Florissant man who had his drivers license revoked after a DWI arrest dismissed his petition seeking declaratory judgment against the state's use of breathalyzer equipment after the AG's Office filed a motion to dismiss.

Anthony D. Gipson, whose BAC registered 0.17, had alleged the state Department of Health's regulations for approving the solution used to calibrate simulators in breathalyzers were inaccurate and the department inadequately tested the solution. He also challenged state regulations for blood, urine and saliva testing.

The state said Gipson had only been tested on a breathalyzer, and his allegations were not supported by facts.

The court did not err in rejecting the alleged lesser-included offense instructions of involuntary manslaughter. In Section 565.024, reckless involuntary manslaughter is not a lesser-included offense in a second-degree murder charge because a finding of recklessness is not required for conviction of the greater offense.

Richard DeClue v. State
No. 75446
Mo. App., E.D., Oct. 5, 1999

The court vacated the defendant's conviction for resisting arrest following a guilty plea because there was an insufficient factual basis for the plea. During the plea proceeding, it was not established that the movement was resisting arrest for a felony assault charge.

State v. Christopher Santillan
No. 74279
Mo. App., E.D., July 27, 1999

The trial court did not commit plain error in allowing cross examination of the defendant about what he told an earlier lawyer when he testified he had lied for six years about the victim's death.

The court did not err in allowing the prosecutor to introduce evidence of an Uzi — not the murder weapon —found in the bedroom of the defendant's parents. The Uzi's location was mentioned but not emphasized during trial.

The trial court also did not commit plain error in allowing the prosecutor to ask the defendant if his testimony on direct was "the first time" he told "this story" in "six years," because the questions did not improperly comment on the defendant's post-arrest silence.

WESTERN DISTRICT

State v. Carl A. Woolfolk
No. 55803
Mo. App. W.D., Aug. 17, 1999

The trial court erred in denying a motion to suppress and considering evidence obtained in an unlawful search.

The appeals court said circumstances surrounding the traffic stop did not give rise to specific, articulable facts creating reasonable suspicion that the defendant was breaking the law. Also, a trooper's questioning of the defendant after the stop ended was an unreasonable seizure.

The court found an illegal search and seizure because the initial stop ended after the trooper returned documents to the defendant, who said he had no more questions. The consent to search was unlawful because a reasonable person in the defendant's position would not have felt free to leave at the time he had allegedly consented to the car search.

UPDATE: CASE LAW

WESTERN DISTRICT

State v. Gregory Morrow
No. 55784
Mo. App., W.D., June 29, 1999

The court modified its earlier opinion but still reversed on the grounds of insufficient evidence the defendant's conviction of possession of ephedrine with the intent to manufacture meth and the class C felony of attempt to manufacture meth.

While evidence indicated the defendant possessed meth-making chemicals and had used meth two nights before his arrest, this alone did not prove he planned or knew how to make meth. State's evidence consisted only of the defendant's possession of toluene, ephedrine, pseudoephedrine, liquid fire and an air tank, and a post-arrest statement that he had used meth.

State v. William E. Wilson
No. 56327
Mo. App., W.D., Sept. 7, 1999

The court reversed the defendant's DWI conviction because the trial court erred in refusing to strike a challenge for cause to a venire person. During the defense counsel's initial voir dire questioning, the venire person clearly stated that if the defendant did not testify, then his ability to render a fair and just verdict would be affected.

State v. Norma Barnum
No. 55877
Mo. App., W.D., June 30, 1999

The court reversed the defendant's conviction of first-degree assault because the prosecutor referred to the defendant's right to remain silent. The defendant chose not to testify at trial. The court was influenced by the repeated comments by the prosecutor in closing argument that the state's evidence was "uncontradicted."

State v. Karen L. Riggs
No. 55763
Mo. App., W.D., Oct. 5, 1999

There was insufficient evidence of a mother's conviction of involuntary manslaughter by failing to provide proper supervision and allowing her 2-year-old son to wander from home and drown in a pond.

The involuntary manslaughter charge was based on recklessness.

The defendant's failure to watch her child for 45 minutes is not reckless enough to rise to homicide charges. The court affirmed the conviction of endangering the welfare of a child in the first degree.

State v. Ruben Darnell Oats
No. 55573
Mo. App., W.D., July 13, 1999

The trial court committed reversible error by preventing the defense counsel from asking venire persons whether they could consider a self-defense claim if evidence showed the victim had been shot in the back of the head. The question as to whether the circumstances of the defendant shooting the victim in the back of the head was a substantial potential for disqualifying bias.

State v. Scott Robert Beeler
No. 55460
Mo. App., W.D., July 20, 1999

The trial court erred in submitting the lesser-included offense instruction of involuntary manslaughter because there was insufficient evidence to show that the defendant recklessly caused the death of the victim. A city marshal was charged with second-degree murder.

The court rejected the state's argument that both intentional conduct under second-degree murder and reckless conduct could be involved.

The court ruled the defendant was guilty of second-degree murder or nothing and involuntary manslaughter should not have been submitted.

State v. Wendell Mitchell
No. WD55053
Mo. App., W.D., June 30, 1999

The trial court did not err in sentencing the defendant to 75 years in prison on each of two convictions of attempted forcible sodomy.

The jury was given the definition of attempt from Section 564.011.1, which is the inchoate offense of attempt. The punishment for attempt to commit forcible sodomy, however, is set by Section 566.060.2.

The court properly defined attempted forcible sodomy using 564.011.1 and set punishment pursuant to provisions of 566.060.2.

State v. William D. Cone
No. 55518
Mo. App., W.D., Aug. 24, 1999

There was sufficient evidence to convict the defendant-psychiatrist of first-degree sexual assault and deviate sexual assault.

Jurors had enough evidence to conclude the victims were unable to understand their conduct was sexual. Instead the women believed their conduct with the psychiatrist was necessary treatment for mental illness and therefore they were mentally incapacitated under Section 556.061(13).

State v. Patrick Starr
No. 54504
Mo. App., W.D., June 8, 1999

The court questioned whether Missouri Supreme Court opinions addressing that self-defense is not a viable defense for felony murder are still viable opinions under the MAI-CR 3rd instructions. The court did not decide the issue although it suggested it was not. The court found no prejudice to the defendant by failure to submit the self-defense instruction.

UPDATE: CASE LAW

WESTERN DISTRICT

State v. Nicholas McGirk
No. 56221
Mo. App., W.D.

There was sufficient evidence of the defendant's conviction of tampering with a judicial official under Section 565.084 although there was no judicial proceeding pending at the time the defendant made comments to the judge that were the subject of the charge.

State v. Freddie L. Clemment
No. 55478
Mo. App., W.D., Oct. 12, 1999

The trial court committed reversible error when it did not permit the defense counsel to ask jurors whether they would draw a negative inference if the defendant failed to testify. During voir dire, the defense counsel was prevented from asking, "Is there anyone that would draw a negative inference from [the defendant] not testifying?"

SOUTHERN DISTRICT

State v. Vernon Perkins
No. 22511
Mo. App., S.D., June 16, 1999

Following a surveillance, the defendant was arrested leaving a hotel room in which police found two hidden bottles of meth. Hotel records showed the room was rented to the defendant's wife under her maiden name and the defendant was not registered.

The state presented no evidence that the defendant had physical possession of the meth. It also had no fingerprint evidence from the bottles or the light fixture in which the bottles were discovered. Police found no controlled substances on the defendant.

The contraband was not in plain view so that the physical possession might be imputed to the defendant because of the obvious presence of the drugs.

The state did not prove the defendant had exclusive control over the hotel room and his mere presence in the room was insufficient to show knowledgeable possession.

State v. David Arles
No. 22413
Mo. App., S.D., July 7, 1999

The court reversed the conviction of possession of pseudoephedrine with intent to manufacture meth for insufficient evidence.

The defendant and his girlfriend were each seen buying six boxes of pseudoephedrine, the maximum allowed under store policy. The defendant was also buying Coleman fuel, acetone and coffee filters.

State experts stipulated that items in the defendant's possession would not create meth. The court found insufficient evidence of guilt.

Also, the purchases were within the store limits. The court relied on explanations from the defendant and his girlfriend as to why the items were purchased.

State v. Aaron Yarber
No. 22790
Mo. App. S.D., Oct. 15, 1999

There was insufficient evidence of the conviction of cocaine possession. The defendant did not have sole possession of the car he was driving when drugs were found under the passenger seat. The cocaine could have belonged to the driver or a previous passenger.

Miranda case: Drastic implications not expected

WHILE THE U.S. SUPREME Court has decided to hear a case on *Miranda* warnings, implications from that decision are unlikely to be as broad as some reports indicate.

The case arises from a 1968 federal law that attempted to restrict the landmark 1966 *Miranda* decision. Under *Miranda*, confessions are excluded from trial if warnings are not given in required situations.

The federal law attempted to limit these excluded confessions. If required *Miranda* warnings were not given, the confessions still will be admitted if the prosecution can show the statements were made voluntarily.

The statute, 18 U.S.C. Section 3501, applies only to federal criminal cases. It was rarely used until prosecutors successfully kept a confession in evidence although the defendant did not receive proper *Miranda* warnings.

The defendant appealed his conviction to the Fourth Circuit, which held in *U.S. v. Dickerson*, 166 F.3d 667 (1999), that Congress had overturned *Miranda* when it enacted the 1968 statute.

The court's reason: *Miranda* warnings are not constitutional rights; they inform of a Fifth Amendment right to remain silent. Thus, the Fourth Circuit found *Miranda* to be a common law rule created by the court, which Congress can alter through legislation.

The U.S. Department of Justice has filed a brief with the Supreme Court asking that the federal law, and the Fourth Circuit's decision, be overturned and the *Miranda* holding be reaffirmed.

While this case could alter the law, it is unlikely it will significantly change the use of *Miranda* warnings by Missouri officers. It also is very unlikely *Miranda* will be completely overturned.

Front Line will keep you informed. The decision will not be issued for awhile. The opinion probably will only affect criminal cases in the federal courts.

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Police encouraged to record gender, race

THE AG's OFFICE is encouraging law enforcement agencies to implement a policy requiring officers to record the gender and race of individuals subjected to traffic stops to ensure nondiscriminatory practices.

Agencies can expect greater scrutiny in the new millennium from legislative and civil rights leaders and the media over the use of racial profiling.

President Clinton last year instructed all federal law enforcement agencies to collect data on the race and gender of those stopped or arrested.

There also are several bills before Congress to mandate reporting requirements for such information.

> "While there is no reason to believe there is a serious problem of racial profiling in Missouri, our office stands ready to offer legal training and assistance to help agencies purge such attitudes. Race should not be considered when making a decision."
>
> Attorney General **Jay Nixon**

Years ago, agencies were told to not record racial data because of discrimination concerns. Now, in response to reports of widespread profiling, agencies are encouraged to capture this information because:

- The trend is to require the collection of data and Missouri agencies should be proactive.
- Data analysis may be insightful. If some officers are unlawfully profiling, the data will help departments detect this problem. Unintentional discrimination also can be uncovered. It matters little to victims if discrimination is unintentional.
- If a department and its officers are "color blind" in enforcement practices, the data will document this. In New Jersey, some officers were falsifying the race of stopped drivers to conceal their discriminatory actions. The officers were fired and prosecuted.

You now can find Front Line on the AG's Office Web site:
Look for the law enforcement link at www.ago.state.mo.us